IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 646 OF 2001

Ashok Soma Misal, age 36 years, Occ.Labourer, R/o. Hanuman Tekadi, Lonawala, Tal.Lonawala, Dist.Pune. (Accused is in jail at Central Prison, Yerwada, Pune - 16.)	)	...Appellant
V/s.		
The State of Maharashtra (Through P.S.O. from Lonawala Police Station)	)	...Respondent

Shri P.B. Naiknaware for the Appellant.

Shri P.S. Hingorani, APP for the Respondent.

CORAM : D.G. DESHPANDE AND V.M. KANADE, JJ.

DATED : DECEMBER 13, 2005

ORAL JUDGMENT (PER V.M. KANADE, J.) :-

. The appellant is challenging the Judgment and order passed by the 5th Adhoc Additional Sessions Judge, Pune, in Sessions Case No.476/2000. The said Judgment and Order dated 30th July, 2001. The Additional Sessions Judge was pleased to convict the accused for

the offence punishable under Section 302 of the Indian Penal Code and sentenced him to suffer Rigorous Imprisonment for life.

2. Prosecution case in brief is that the accused initially used to reside in Village Alamwadi, Taluka Mohod, District Solapur. His Brother Sudhakar who was staying at Lonawala called him in search of work. Accordingly, he alongwith his wife Mangal and two sons and a daughter went to Lonawala and started residing there. On 15th July, 2000 at about 16.45 hours when the wife of the appellant Mangal and the children were at home, the accused came drunk, quarrelled with his wife, caused injury by a blade on her face and stomach and after his wife fell down, he hit her with a stone. As a result of the assault, she died on the spot. Thereafter, the accused went to the police station and lodged a FIR. The accused was arrested. The statements of the witnesses were recorded. The chargesheet was filed against him. He pleaded not guilty to the charge. The trial Court on the basis of the evidence convicted the accused for the offence punishable under Section 302

of IPC and sentence him to suffer R.I. for life.

3. We have heard the learned Counsel appearing on behalf of the appellant and the learned APP appearing on behalf of the State. The learned Counsel for the appellant has taken us through the Judgment and Order of the trial Court and the oral and documentary evidence is adduced on record.

4. In the present case, a short point which falls for consideration before this Court is whether the accused is entitled to get the benefit of exception 1 to Section 300 of the IPC. The facts disclosed in the case are that after the accused committed the said act, he promptly went to the police station and narrated the entire incident to the police. In the present case, the prosecution has examined 7 witnesses. PW 3 - Leela R. Waghmare and PW 4 - Anita S. Tupe who are alleged to be eye witnesses have turned hostile. PW 1 - Ashabai Kalekar has not seen the incident, however, she saw that there was a crowd in front of the accused, therefore, she went there to find out why crowd had gathered. She

found that the wife of the accused was lying in a pool of blood. She, therefore, telephoned to the police station. This Witness not being eye witness does not assist the prosecution case. PW 2 - Munir A.R. Bagwan is the panch who prepared the panchanama in respect of scene of offence. PW 6 - Shankar Rathod is the other panch who was called by the police who acted as a panch for the seizure of the cloths from the accused. Pw 7 - Dr.Madhave Waghmare, the doctor who performed the post mortem of the deceased. PW 8 - Kashinath Salvi is the Investigating Officer who carried out the investigation. He has stated that about 5.00 p.m., the telephone call was received that the accused had assaulted his wife with a grinding stone and committed her murder. He, therefore, deputed one person to find out and make inquiry. He has stated that thereafter at 17.30 hours, the accused came and lodged the complaint about the incident. He has stated that this was recorded as per the statement made by the accused. The further investigation was carried out. The blood stained cloths were sent to the Chemical Analyser.

5. PW 5 - Dipali Misal is the only eye witness who has seen the incident. PW 5, however, was of the six years of age when the incident occurred. She is the daughter of the accused and deceased Mangal. She has stated that her father came drunk, assaulted her mother on her belly and hit her with a grinding stone. The learned Counsel appearing on behalf of the appellant has submitted that the alleged eye witness cannot be relied upon as she was six years of age and from her cross-examination, he pointed out that her answers which she had given clearly shows that she did not remember anything and therefore, she was not a reliable witness. He further submitted that the accused had surrendered on his own. From his statement which was recorded by the police, it can be seen that the deceased had an affair with two people at their native place and on that count, there were frequent quarrels between the husband and wife earlier when they used to stay at their native place. He submitted that in the statement of the accused which was recorded in the police station, the accused had stated that the deceased was insisting on going back to her native place alone and had also

withdrawn certain amount from the bank and thereafter the said incident had taken place. Learned APP for the State, however, vehemently opposed the said statement. He submitted that there was sufficient evidence to indicate that the accused had committed the murder of his wife.

6. In the present case, according to the police, PW - 1 had given a telephone call and had informed the police that the accused had murdered his wife. Accordingly, an entry was made in the Station Diary. This fact is stated by PW - 1 and also by PW - 8, the Investigating Officer. The prosecution has not explained why this telephonic information had not been recorded as FIR. The prosecution, however, has chosen to record the statement of the accused as a FIR. In our view, since the first information was received by the police on the basis of the telephonic information given by PW -1, that should have been recorded as a FIR. For these reasons, the statement of the accused cannot be treated as a FIR.

7. The accused in this case has pleaded not guilty to the said charge. PW 6 - Dipali has stated in her evidence that the accused had committed the said offence. In our view, there is no reason to dis-believe the testimony of this witness. Though the witness was a minor, the Court had recorded her evidence after it was satisfied that she was in a position to understand the questions which were put to her and could satisfactorily given answers to the said questions. PW 6 is the father of the accused. There is no reason why she would make a false statement against her own father. Further the accused himself had gone to the police station and had given his statement. Though the accused in his statement under 313 has denied the incriminating circumstances which was put to him, the statement made by him to the police officer immediately after the incident cannot be totally ignored. The said statement is exhibited as Exhibit 26.

8. Sections 299 and 300 lay down the law of homicide. Under Section 300 of the IPC, various exceptions have been given which bring out the accused

from the rigour of Section 300. However, under section 105 of the Evidence Act, the burden is on the accused of proving the existence of circumstances bringing the case within any exception. In the present case, the defence which is taken by the accused is of total denial, the statement given by the accused to the police immediately after the commission of the offence cannot be ignored which statement alongwith other evidence will assume importance and if the statement coupled with the other evidence brings the case of the accused within the four corners of the exceptions, such benefit will have to be given to the accused.

9. The accused in his statement has given the entire narration of events from the date of his marriage with deceased Mangal till the time he killed her. He has stated that after the first year of marriage, Mangal gave birth to a son who died immediately. Thereafter, some relatives from her village came to see her. He alongwith his brother-in-law had gone out for a walk and other person had stayed in the house. When he returned back, he noticed that the other person was wearing a

towel and his wife also came along with him the same room adjusting the saree. At that time, he realised that his wife had extramarital affair with that person. Thereafter on another occasion, he saw Babasaheb Dnyandeo Khot in a compromising position with his wife in that house when he returned back from work. He, however, condoned his wife and told her not to behave in this manner in future. However, he noticed that his wife continued to have extramarital affair. He, therefore, came to Lonawala in order to ensure that his wife does not have any contact with those two persons. At Lonawala, he earned money by doing labour work and saved sufficient amount which was deposited by him in the bank for the marriage of his daughter. Two days before the incident, he had told his wife that he wanted to go to his village and come back within a day. Few days before the date of the incident, his wife insisted that she would go alone to the village and was insisting that she would be allowed to withdraw the certain amount form the bank. This happened after the accused came back from his work and therefore, he killed his wife. The statement merely discloses that on earlier occasion,

he had condoned the wife, however, on the said day possibly he could not control himself and in a fit of range, he tried to dis-figure her face and hit a stone on her head. The conduct of the accused is also relevant in this case. In the present case, the accused immediately went to the police station and informed the police about the said incident and the entire statement was recorded. The accused, therefore, appears to have acted under the grave and sudden provocation which was given by his wife by stating that she would go alone the village where she had affair with two persons.

10. Exception one to Section 300 contemplates the fulfilment of four conditions; (1) There must be a provocation, (2) It should be grave, (3) Provocation should be sudden and (4) The provocation must have deprived the accused of his power of conferment.

11. PW 6 - Dipali has stated in her evidence that one year before the incident, her father and mother used to quarrel at their native place and thereafter, they had come to Lonawala and on the date of the incident,

the father had thrown a stone on the head of his wife. The evidence of PW 6 discloses that there used to be quarrel between the husband and wife one year before the incident. The statement of accused, therefore, is to some extent corroborated by the evidence of PW 6. The above statement of the accused and the other fact corroborated by the evidence of PW 1 and 2 as also Panch witness which disclosed that the incident has taken place in the manner in which description is given by the accused in his statement to the police. Another circumstance which has to be taken into consideration is that the accused at the first opportunity immediately after the commission of offence had given his statement to the police by going to the police station after the commission of the offence. Therefore, it cannot be said that his statement is an after thought or the statement is given on legal advice. Taking into consideration, the totality of the circumstances on the record, in our view, the accused would be entitled to get the benefit of the exception No.1 of Section 300.

12. The appeal accordingly is partly allowed.

Conviction of the appellant for the offence punishable under Section 302 of the Indian Penal Code and the sentence awarded for the commission of the said offence is set aside and the accused is acquitted for the commission of the said offence. Conviction, however, is altered to the offence punishable under Section 304 Part-I of the Indian Penal Code and the appellant is sentenced to suffer rigorous imprisonment for a period of seven years. The appellant is in jail since 16th July, 2000. The appellant will be given set off for the period which he has already undergone.

. The appeal is partly allowed in the above terms.

(D.G. DESHPANDE, J.)

(V.M. KANADE, J.)